

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

Vitharamalage Don Edonis
Uda Pebotuwa,
Pebotuwa.

Plaintiff

C.A. No. 729 / 2000 F
D.C. Ratnapura No. 6587 / L

Vs.

Rajapaksa Dewage Somaratne
Rajapaksa,
No 114, Ratnapura Road,
Nivitigala.

Defendant

AND NOW BETWEEN

Vitharamalage Don Edonis
Uda Pebotuwa,
Pebotuwa.

Plaintiff Appellant

Vs

Rajapaksa Dewage Somaratne
Rajapaksa,
No 114, Ratnapura Road,
Nivitigala.

Defendant Respondent

BEFORE : UPALY ABEYRATHNE, J.

COUNSEL : S.N Vijithsingh for the Plaintiff Appellant
R.M.D. Bandara with C.L.W. Goonesekera
for the Defendant Respondent

ARGUED ON : 25.10.2013

DECIDED ON : 17.01.2014

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted the said action against the Defendant Respondent (hereinafter referred to as the Respondent) in the District Court of Ratnapura seeking for a declaration of title and ejectment of the Respondent from the land described in the schedule to the plaint. The Respondent filed an answer praying for a dismissal of the Appellant's action. After trial the learned District Judge dismissed the Appellant's action answering the issues No 8, 9, 10, 11, 12, 13 and 14 in favour of the Respondent. Being aggrieved by the said judgment dated 04.07.2000 the Appellant has preferred the present appeal to this court.

The Respondent has raised issues No 9, 10, 11, 12 and 13 claiming a prescriptive title to the land in suit. The Appellant contended that the Respondent has not adduced any evidence to prove a prescriptive title to the said land.

The learned District Judge has come to a conclusion that the Appellant has failed to identify the land described in the deed bearing No. 26132

(P 7) which was the title deed of the Appellant. According to the P 7 the land depicted in Plan bearing No 05 dated 20.11.1966 made by S. Ramacrishnan, Licensed Surveyor, was the land transferred by P 7. At the trial the Appellant has produced a plan bearing No 05 dated 20.11.1976 made by S. Ramacrishnan, Licensed Surveyor, marked P 1 which depicted partitioning of a land called 'Portion of Grand Central Estate'. The Appellant position was that Lot 42C depicted in P 1 was the land depicted in P 7. According to P 1 the land had been partitioned on 13.01.1978. If so such a land could not be transferred by P 7.

In the light of the said evidence I am of the view that the learned District Judge was correct in concluding that the Appellant had failed to prove his case on a balance of probability.

On the other hand the learned District Judge has concluded that the Respondent has prescribed the land in suit. It seems from the said judgment that the learned District Judge has come to the said conclusion upon the sole evidence of the Respondent. According to the evidence of the Respondent he had derived title to an undivided $1/6^{\text{th}}$ share of a land described in schedules to the deeds produced marked V 1, V 2 and V 31. In his evidence the Respondent has stated that his father commenced a tea plantation in the said land and he helped his father since he did not go to school. Apart from that the Respondent has not explained the nature of their possession of the land. There was no evidence to prove that the Respondent or his father had commenced an undisturbed and uninterrupted possession or a title adverse to or independent of that of the Appellant.

It was common ground that the Respondent's father had been in possession of the land in suit as a co-owner. Since the Respondent also had entered

in to the possession of the land as a co-owner he cannot acquire title by prescription to such property unless he get rid of character in which he commenced to possess by doing some overt act showing an intention to possess adversely to the Appellant. When there is a significant absence of clear and specific evidence of such acts of possession as would entitle a party to a decree in his favour in terms of Section 3 of the Prescription Ordinance, such a party cannot succeed on a plea of prescription.

In the case of the government Agent, Western Province vs. Ismail Lebbe (1908) 2 Weer 29 (Full Bench) it was observed that “where a person who has obtained possession of a land of another in a subordinate character, e.g. as tenant or mortgage, seeks to utilize that possession as the foundation of a title by prescription, he must show that by an overt act, known to the person under whom possesses he has got rid of his subordinate position, and commenced to use and occupy the property *ut dominus*.”

G.P.S. De Silva CJ in the case of Sirajudeen and two oyers vs. Abbas (1994) 2 Sri L. R. 365 (SC), observed that “ Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights. As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court. One of the essential elements of the plea of

prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner.”

The Respondent has not led evidence of any witnesses or has not produced any supporting documents to prove that he has commenced a title adverse to or independent of that of the Appellant.

There are two points regarding the law of prescription that should be always well borne in mind; (1) a possessor is always presumed to hold in his own right and as proprietor until the contrary be demonstrated; (2) the contrary been once established, and it being shown that the possession commenced by virtue of some other title, such as that of tenant than the possessor, is presumed to have continued to hold on the same terms, until he distinctly proves that his title has been changed. Hence no inference can be drawn from the evidence of the Respondent with regard to a title adverse to or independent of that of the Appellant. The Respondent’s evidence as a whole does not show that his possession was adverse in the sense that his possession is incompatible with the title of the Appellant.

The learned District Judge has not address his mind to the said requirements of Section 3 of the Prescription ordinance. Hence the issues No. 9, 10, 11, 12 and 13 should be answered in the negative. Subject to the said variation I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Court of Appeal